

Definition of Modification. Paragraph 131 of the FNPRM proposes to adopt the definition of "major modification" amendments which the Commission initially proposed for common-carrier 931 MHz paging applications, i.e., an amendment is a major modification to an existing application only if (a) it is for the same frequency as currently proposed, and (b) if it involves a relocation, it proposes a new site 2 kilometers (or 1.6 miles)^{27/} or less from the currently proposed site.^{28/}

Paragraph 132 of the FNPRM proposes to apply this definition of "major modification" to determine when an application is a modification to an existing station, i.e., is not subject to the Commission's auction authority. In this context, Simrom notes that the Commission failed to restate in the FNPRM the criteria proposed in the Part 22 Further Notice (at ¶18) to determine a modification application, i.e., an application is a modification to an existing station only if (a) it proposes new locations 2 kilometers (or 1.6 miles) or less from a previously authorized and fully operational base station licensed to the same licensee on the same frequency, (b) it proposes to relocate an authorized site to a new location 2 kilometers (or 1.6 miles) or less from

^{27/} As a threshold matter, the Commission's kilometer-to-mile conversion is incorrect: 2 kilometers is 1.24 miles; 1.6 miles is roughly 2.6 kilometers. Thus, the Commission's proposal is internally inconsistent and requires clarification.

^{28/} FNPRM, ¶131, citing Part 22 Rewrite, 9 FCC Rcd ____ (FCC 94-102, released May 20, 1994) (¶18) (Further Notice of Proposed Rulemaking) ("Part 22 Further Notice").

the current site, or (c) the application seeks a technical change that would not increase the service contour.

Simrom supports the Commission's proposal to use the same criteria, subject to specific exceptions noted below, to determine major amendments and modifications to licensees. However, in several important respects, the specific proposals advanced by the Commission are far too rigid and do not serve the public interest.

First, the Commission's proposal is substantially irrelevant for area-licensed services, such as cellular, narrowband and broadband PCS, regional and national paging, and nationwide 220 MHz CMRS. If the Commission adopts Simrom's proposal to use area licensing for 220 MHz CMRS, then such criteria would apply there as well. The Commission needs to propose a different set of criteria for such services.

Second, the Commission's use of a 2-kilometer radius (or the 1.6 mile/2.6 kilometer radius) to determine when an application is a license modification is far too small. This will work a hardship on licensees, especially on smaller businesses who do not have the resources to develop new tower sites merely to maintain the 2- (or 2.6-) kilometer spacing. For each service, the Commission should use a distance roughly twice the expected reliable service contour for base stations licensed at maximum

height and power as the maximum distance under which a new application is deemed to be modifying an existing license.^{29/}

This situation is one in which major-amendment and license-modification criteria should differ. For amendments, the Commission should keep the maximum relocation distance at 2 (or 2.6) kilometers, so that applicants cannot move their proposed sites without reappearing on public notice. However, modification applications will always appear on public notice, so this concern is irrelevant. Here, and in accord with existing Part 22 practice, the Commission's concern should be that the existing and proposed sites can be operated as an integrated system. This concern is met when the predicted, reliable service contours for the existing and proposed sites can touch.

Third, for two-way stations (800 MHz, 900 MHz, and 220 MHz SMR, as well as IMTS), the Commission's "same frequency" criteria lacks a valid technical justification. The Commission's proposal (from the Part 22 Further Notice) was developed in the context of 931 MHz paging, in which all transmitters comprising a single system use the same frequency, with simulcasting. But for two-way systems, the criteria needs to be relaxed to say "a frequency in the same frequency band which can be used for the same purposes."

Fourth, the Commission's "same licensee" criteria in determining when applications are proposing modifications to authori-

^{29/} For 220 MHz CMRS licensees, this distance would be 90 kilometers (56 miles). See 220 MHz Band, 6 FCC Rcd 2356, 2371 (1991).

zations (rather than a new station) is too rigid. Currently, the Commission's Part 22 practice is to deem commonly owned stations (even if licensed to different entities) as the "same licensee" for the purpose of measuring composite service contours. The Commission should carry this notion forward, such that stations which are operated by licensees under substantially common ownership or as part of an integrated communications system are deemed to belong to "the same licensee" for the purpose of determining when an application proposes a license modification.

Fifth, existing Section 22.23(g) contains several important exceptions to the general rules on when an amendment is a major modification. While all these should be carried forward, the following are the most important:

- 22.23(g)(2): When "[t]he amendment resolves frequency conflicts with other pending applications but does not create new or increased frequency conflicts."
- 22.23(g)(3): When "[t]he amendment reflects only a change in ownership and control found by the Commission to be in the public interest...", i.e., as a result of granted transfer or assignment application to an existing authorization.
- 22.23(g)(4): When "[t]he amendment reflects only a change in ownership or control which results from [a settlement] agreement under §22.29 whereby two or more applicants ... join in one or more of the existing applications and request dismissal of their other application(s)...."
- 22.23(g)(6): When "[t]he amendment does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have foreseen at the time of filing, such as, for example ... the loss of transmitter or receiver site...."

Subsections 22.23(g)(2) and 22.23(g)(4) are required be carried forward into CMRS regulation by Section 309(j)(6)(E) of the

Communications Act, which imposes on the Commission the continuing:

[O]bligation in the public interest to continue to use engineering solutions, negotiation, ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

Thus, the Commission should carry each of those exceptions forward for all CMRS applications.

Sixth, the Commission should continue to apply the existing practice with respect to Part 22 applications which permits two applicants to consent to accept harmful electrical interference which otherwise would render their applications mutually exclusive. This practice is also required by Section 309(j)(6)(E) of the Communications Act. A similar practice exists with respect to Part-90 800 MHz applicants and licensees, for whom the Commission will accept short-spacing by consent.

Finally, for the 220 MHz CMRS licensees who will be operating this year pursuant to an STA to satisfy their initial construction deadline,^{30/} the Commission deem both the location authorized by the STA and the that authorized by the initial license as the licensee's "authorized site" for the purpose of applying its major-modification and modification-to-authorization rules.

Special Temporary Authority. Paragraphs 135-138 of the FNPRM request comment on the standards to be applied when granting Special Temporary Authority (STA) to Part-90 CMRS licensees.

^{30/} This situation is described supra, pages 17-18.

As the Commission explains, its discretion is somewhat limited by the Communications Act with respect to CMRS applicants and licensees.

However, as a transition matter, the Commission should continue to extend existing Part 90 STAs, even for licensees immediately classified as CMRS carriers. In this limited situation, the transition to CMRS regulation will itself be the "extraordinary circumstances" justifying the continuation of the grandfathered STA.

VII. THE COMMISSION SHOULD ADOPT PART-22 STYLE TRANSFER REQUIREMENTS AND LIMITATIONS FOR 220 MHz SYSTEMS.

Paragraphs 141-146 of the FNPRM request comment on the proper procedures for transferring control of or assigning CMRS licenses. For 220 MHz CMRS systems, the Commission should adopt rules which have worked well for its existing common-carrier services under Part 22 of the Rules.

Specifically, for local 220 MHz systems, the Commission should apply the policies now appearing in Section 22.40(a) of the rules, i.e., transfer-of-control and assignment applications are accepted at any time after licensing, but require a determination that the proposed transfer or assignment will not constitute trafficking or speculation unless the system has been constructed or (in the rare situation that the license was awarded by comparative hearing) has been in operation for one year. The Commission has found that this policy permits licensees to reshape their systems to provide more complex service

offerings to their subscribers, a result which serves the public interest. The benefits of this policy should be extended to all local CMRS licensees.

For nationwide 220 MHz systems, the Commission should generally adopt the policies now appearing in Section 22.40(b)(1) of the rules for unserved-area cellular systems, i.e., that the system must be operational for a period of one year before it can be assigned or transferred. (This policy should also apply to wide-area, non-national 220 MHz systems, if the Commission were to adopt Simrom's proposal, supra at pages 8.) However, the Commission should freely permit pro forma or involuntary transfers or assignments at any time; by definition, no trafficking or speculation can occur in those situations.^{31/}

VIII.THE COMMISSION SHOULD PERMIT 220 MHz LICENSEES TO REQUEST THAT THEIR LICENSES BE MODIFIED TO BEAR A GRANT DATE OF AUGUST 9, 1993, AND THUS BE SUBJECT TO THE THREE-YEAR TRANSITION FOR EXISTING PMRS LICENSEES.

Finally, the Commission should use this proceeding to rectify a grave injustice which the random hand of fate (with a little help from Congress) has wreaked upon the 220 MHz local licensees.

As noted in paragraph 1 of the FNPRM, the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") amended the Commu-

^{31/} Additionally, the Commission should freely permit transfers or assignments in situations in which the transfer or assignment is either beyond the control of the licensee (e.g., his or her death) or such that trafficking or speculation cannot be a motivation. Such exceptions are now listed in the subsections of Section 22.922(a) of the Rules.

nications Act, inter alia, by replacing Section 332(c) to provide for regulatory parity between private- and common-carriers who provide CMRS. However, Section 6002(c)(2)(B) of the Budget Act establishes a three-year transition rule for private radio licensees newly classified as CMRS but licensed prior to August 10, 1993.^{32/} Under this transition period, the existing licensees will be treated as being in the PMRS until August 10, 1996. In contrast, licenses who first received private-radio authorizations after August 10, 1993, become immediately subject to CMRS regulations.

By happenstance, the Commission issued a portion of the initial, local licenses for 220 MHz SMR service prior to August 10, 1993, and the rest afterwards. This happenstance means that, although all 220 MHz local licenses are now constructing their systems and beginning commercial operation, they are proceeding under either of two regulatory structures (CMRS or PMRS) depending upon the "luck of the draw."^{33/}

This arbitrary division of the 220 MHz licensees into two regulatory structures is hindering the development of the industry. It complicates the efforts of Simrom, Suncom, and others

^{32/} FNPRM, ¶4 & n.9.

^{33/} Indeed, the confusion is compounded by the Commission's interpretation that the statutory right to a 3-year transition period attached to the licensee, and not to the license. Thus, a 220 MHz licensee having one license issued before August 10, 1993, is subject to the 3-year transition rule as to all its 220 MHz licenses, even those issued after August 10, 1993. Similarly, an existing (pre-August 10, 1993) private radio licensee receives the benefit of the 3-year transition rule for all its 220 MHz licenses without regard to their date of grant.

who are seeking to create regional 220 MHz networks by combining local systems licensed to others. As things now stand, these networks will be partly CMRS, partly PMRS until August 1996.

The Commission staff recognizes that this crazy-quilt pattern of CMRS/PMRS regulation serves no valid regulatory purpose. Congress did not intend this division of regulation to occur, which arguably violates the requirement of Section 6002(d)(3)(B) of the Budget Act which requires comparable regulations for substantially similar services. However, the staff is also concerned that the Budget Act leaves it no flexibility to exempt licensees first granted after August 10, 1993, from immediate CMRS regulation.

Unquestionably, the Commission holds broad authority for the issuance and modification of licenses.^{34/} Specifically, the Commission may modify licenses by rulemaking or individualized order at any time during their term. There is nothing in the Budget Act which diminishes these powers. In enacting the Budget Act, Congress thus recognized that the Commission could modify the effective dates of licenses for good cause shown.

Accordingly, the Commission should exercise its broad power to modify licenses to permit 220 MHz SMR licensees to request that their licenses be modified to contain a grant date of August

^{34/} This authority is established by numerous Sections of the Communications Act, including Sections 4 (Powers of the Commission), 303 (General Powers), 308 (Applications for Licenses), 309(h) (general power to establish terms of licenses), and 316 (Modifications of Licenses).

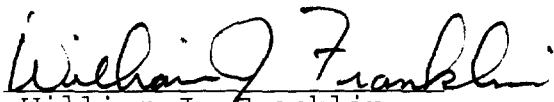
9, 1993.^{35/} This request would state that the licensee waives its rights to a hearing under Section 316 of the Communications Act, consents to the requested modification, and agrees that its deadline for construction will be measured from August 9, 1993, unless extended by the Commission. Upon the grant of this request, the requesting licensee would be regulated under the 3-year transition rule for private-radio CMRS licensees.

CONCLUSION

Accordingly, Simrom, Inc. respectfully requests the Commission to adopt rules (as set forth herein) which will facilitate the orderly development of 220 MHz SMR systems.

Respectfully Submitted,

SIMROM, INC.

By: 
William J. Franklin
Its Attorney

WILLIAM J. FRANKLIN, CHARTERED
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006-3404
(202) 736-2233
(202) 452-8757 Telecopier

^{35/} For administrative convenience, the Commission could limit the period of time within which it will accept such requests to a relatively short filing window.